

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LONNIE FICKLIN)	
Claimant)	
VS.)	
)	
THOMAS J. POWELL)	Docket No. 255, 911
d/b/a/ POWELL ROOFING)	
Respondent)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requested review of the July 17, 2003 Award entered by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on January 20, 2004.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Garry W. Lassman of Pittsburg, Kansas, appeared for the respondent. Edwin H. Bideau III of Chanute, Kansas, appeared for the Kansas Workers Compensation Fund (Fund)

RECORD AND STIPULATIONS

The Board considered the record listed in the ALJ's Award. In addition, the Board considered the May 15, 2003 deposition testimony of Lonnie Ficklin.

The Board adopts the stipulations listed in the Award, but notes that although claimant and respondent agreed the parties were covered by the Kansas Workers Compensation Act, the Fund did not. Also, during oral argument to the Board, the Fund agreed that the respondent is insolvent.

ISSUES

The ALJ found that "[c]laimant did not sustain accidental injury on April 17, 2000, while in the course and scope of employment with the [r]espondent."¹ As a result workers compensation benefits were denied. Claimant contends this was error and requests the Board to decide the remaining issues not reached by the ALJ.

Conversely, respondent and the Fund contend the ALJ's Award should be affirmed. But if the Board should reverse the ALJ on the issue of personal injury by accident arising out of and in the course of employment, respondent and the Fund request that the remaining issues be remanded for determination by the ALJ.

Accordingly, the issue for the Board's review is whether claimant has met his burden of proving that he suffered personal injury by accident arising out of and in the course of his employment with respondent on the date alleged.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After reviewing the entire evidentiary record filed herein and having considered the briefs and arguments of the parties, the Board finds that the Award should be reversed.

On April 17, 2000, claimant was working for respondent Thomas J. Powell d/b/a/ Powell Roofing and Construction (hereinafter Powell Roofing). He began work that morning at the respondent's office and shop building on Joplin Street in Pittsburg, Kansas. Claimant loaded tools and equipment onto a company truck and proceeded to a job site. After about an hour of work claimant's back started aching. His pain worsened as the day progressed. By early afternoon claimant could hardly stand up and had to go home. However, resting at home did not relieve claimant's symptoms and after a few hours he went to the hospital emergency room.

Claimant reported his injury as work-related and requested his employer to provide him with medical treatment. Respondent informed claimant that it did not have workers compensation insurance coverage.

Claimant described the events surrounding his work-related injury at the preliminary hearing and at the regular hearing in this matter. His testimony was consistent each time he testified.

¹ Award at 2 (July 17, 2003).

Claimant's employer, Tom Powell, also testified at the preliminary hearing and by deposition following the regular hearing. His testimony was not consistent. At the preliminary hearing Tom Powell testified that on the morning of April 17, 2000, when claimant arrived at work he asked claimant how he was doing. Claimant answered that he pinched his back when he got out of the car out there. Nothing else was said at that time. Shortly before noon Tom Powell noticed that claimant was moving not quite right and he asked claimant if he was alright. Claimant answered that when he reached down to get his pouch when he got out of the truck, he pinched his back. Tom Powell told claimant that if he was not feeling good then he should go on home. On cross examination Tom Powell clarified it was his understanding that claimant was describing to him a second injury on that same day whereby claimant had injured his back at the job site.

A. (Thomas J. Powell) The morning of the 17th he came in and - - He didn't talk very much. He's a kind of a [sic] quiet fellow. He came walking in and I said, how are you doing. He said I kind of pinched my back when I got out of the car out there and got his coffee and sit [sic] down.

Q. (Mr. Lassman) Is that before he started to work for you?

A. Oh, probably around a quarter till eight.

Q. And did he go on to work that day?

A. Yes.

Q. Was anything else said at that time?

A. No.

Q. And what was the next conversation you had with him regarding his back condition?

A. It was around a quarter till twelve, and I came up on the job and he was kind of moving not quite right. And I said, you all right, and he goes, I reached down to get my pouch when I got out of the truck and I pinched my back.

Q. And has that been the extent of your conversation with him?

A. I told him if you don't feel good, go on home. That's about it, because I'm not really not [sic] on the job that often any more.²

But at his subsequent deposition, Tom Powell described the conversation differently.

² P.H. Trans. at 38 and 39.

"Now, look, he came in and told me that morning that he hurt his back, he came to work and was acting funny," and I got - - of course, they all work for me. But I said, "What's wrong with you?" He said, "Oh, I hurt my back the other day." He said, "I'll be all right." I said, "Now, if you're not, I don't want you going to work today. Because I don't have no insurance." I tried to keep a hammer on top of that. And if anybody even acted like they were sick to their stomach, I sent them on home. So that's exactly what he did. Right in my office he made a statement in front of four people that he twisted his back at my brother's job. He even made that statement in the office.

Q. (Mr. Bideau) Okay. This is Lonnie Ficklin - -

A. That's right.

Q. - - telling you that he twisted his back at your brother's job?

A. I said, "You don't act like you're feeling very good." He's a heavy drinker and does other things. I figured that he was messed up on stuff and I wasn't going to use him that day. And he said, the very words he said, "No, I hurt my back the other day. I'm all right. I got a little catch in it, but I'll be all right." I said, "All right. Are you sure?" He said, "Yeah." So I went on to work. And I went to the job - - I'll just tell you the honest truth, I went to the job and he acted like he was in a little pain. He said, "My back's really hurting now." I said, "You'd better take off then." He went home. That next morning or the afternoon he went to the lawyer. To Bill.

Q. Who were the four people that heard him - -

A. I'm sorry?

Q. Who were the people that heard him make that statement in the office?

A. The girl that was in the office, Terry [sic] Rose, and I think my brother, Jerry. Whoever was in the office that morning. I'm pretty sure it was Jerry, Terry and Raenn [sic] and myself. And this guy was always at work on time, I mean, he - - and an excellent worker. I can't say nothing about his work.³

Two of the employees who supposedly witnessed Thomas Powell's conversation with the claimant when claimant arrived at work on the morning of April 17, RaeAnn Rose and Jerry Powell, also testified at the preliminary hearing. And Terry Powell testified later by deposition. No one described this alleged conversation with claimant in a manner consistent with Tom Powell's deposition testimony.

RaeAnn Rose worked for Powell Roofing as a secretary. Her job duties included handling payroll and workers compensation matters. Ms. Rose testified that the first time

³ Thomas J. Powell Depo. at 37 and 38.

she heard Mr. Ficklin say anything about his back was on April 18, 2000. Claimant did not show up for work that day and Tom Powell asked her to call claimant and see if he was coming in. She said that when she called and spoke with claimant on the telephone he said that he was not coming into work that day because he hurt his back getting out of a car.

A. (RaeAnn Rose) He didn't show up for work one day and Tom asked me to call and see if he was coming in, and he told me, no, that he hurt his back getting out of a car.

Q. (Mr. Lassman) And if he claims that he hurt himself on the 17th of April, which was on a Monday, was it the next day that he didn't show up for work?

A. I believe so.

Q. Is that the day you called him?

A. Yes.

Q. Is that when he told you that he had hurt himself getting out of the car?

A. Yes.

Q. Did he say whose car [sic] or where?

A. He was living with Tom's brother and it was Tom's brother's car.

Q. Over there at Tom's place?

A. Across the street.

Q. Before he started to work?

A. Right? ⁴

Jerry L. Powell also testified at the preliminary hearing. Jerry Powell is a brother of Tom Powell and works for Powell Roofing. Claimant described Jerry Powell as his supervisor. Jerry Powell testified that claimant told him he twisted his back getting out of a pickup on April 17, 2000.

Q. (Mr. Lassman) What did he tell you?

A. (Jerry Powell) Twisted his back getting out of a pickup.

⁴ P.H. Trans. at 22.

Q. And when did he do that?

A. Supposedly on the morning when I pulled to the job.

Q. He says that this accident that he sustained occurred on April the 17th of 2000. Well, strike that. Was that on a Monday that you talked to him?

A. Yes.

Q. Or that he told you he hurt his back getting out of a car [sic]?

A. That's when I arrived at the job site.

Q. Was that on that Monday?

A. Uh huh.

The Court: Yes?

A. Yes.

Q. Whose car [sic] was he getting out of, did he say?

A. He was riding with George. I can't remember the worker's last name. But in a blue truck.

Q. And did he work that day?

A. He worked for a little bit.

Q. And what happened?

A. He was getting pain in his back from when he was cutting wood.

Q. Is that what he told you?

A. Well, he said his back hurt.⁵

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Q. (Mr. Phalen) Mr. Powell, what time did you pull up on the job site on the 17th of April?

A. (Jerry L. Powell) I can't remember. I think it was probably around between eight and eight thirty.

⁵ *Id.* at 34.

Q. My client was already there working; is that right?

A. Yes.

Q. And he had ridden to the job site in this pickup truck?

A. With the other worker in the other worker's truck.

Q. And the truck that they were riding in is a Powell Roofing Truck?

A. No.

Q. It's a truck they use to - -

A. An individual's truck.

Q. But they use it during their work?

A. Yes.

Q. And so they had gone to Powell Roofing's offices here over on Joplin Street; hadn't they?

A. Yeah.

Q. Is that yes?

A. Yes.

Q. And they picked up tools for the job?

A. I think so, yes.

Q. And that would have included buckets of nails?

A. I didn't know if we had any buckets of nails that day. I thought they was on the job site.

Q. But they would have loaded tools up into the truck and driven to this job site; is that right?

A. Normally.

Q. Is that what happened on the 17th?

A. As far as I - - I don't know if they loaded it. I wasn't there when they loaded up anything during the day, because I showed up at the job site that day.

Q. The bottom line is that my client was on the job the minute he got in that truck and left from the Powell Roofing offices to go to the job site; is that correct?

A. Yes.

Q. And he told you, as I understand it, that he injured his back getting out of that pickup that morning?

A. Yes.

Q. And when he told you that he had injured his back getting out of that pickup truck, he was referring to getting out at that job site that he was currently on; is that right?

A. Yes.⁶

Terry L. Powell did not testify at the preliminary hearing. But his deposition was taken after the regular hearing. Terry Powell is the younger brother of Tom Powell and the twin brother of Jerry Powell. Claimant was living with Terry Powell in April 2000. Terry Powell describes claimant pulling a muscle in his back while existing Terry Powell's car the morning of April 16, 2000 outside the office of Powell Roofing. One of Terry Powell's brothers had called the house that morning and asked Terry to bring claimant to work. Terry does not specifically identify which brother, but from the context of the question it appears he was talking about Tom, although it could have been Jerry.

Q. (Mr. Bideau) Why were you taking him to work?

A. (Terry L. Powell) Apparently they had something to do and I just dropped him off across the street from my brother's shop.

Q. All right. Tell us, if you could, what you remember happening when you dropped him off for work that day.

A. Well, when I pulled up to the corner he went to get out of my car and as he got out, because my car sits so low to the ground, when he went to get out he - - I don't know, he kind of twisted a little bit and he said, "I think I pulled a muscle in my back."

Q. Okay.

A. And I asked him if he was all right, and he said, "Yeah." And I just drove off.⁷

⁶ *Id.* at 36 and 37.

⁷ Terry L. Powell Depo. at 6.

According to Terry, claimant's back worsened at work on both April 16 and April 17 and on both of those days claimant was unable to complete his entire work shift.

Q. (Mr. Phalen) And the day that he was getting out of the car, that's what you were doing was taking him to work?

A. (Terry L. Powell) Yes, it was.

Q. And that's because your brother wanted him at work - -

A. True.

Q. - - and your brother called and said, "I got work today," and you got in the car and drove him down there, true?

A. True.

Q. And you're saying that he got out of the back, or got out of your car and stood up and said he - - what did he say?

A. He thought maybe he had just pulled his back. Because he kind of made a motion like he hurt his back when he got out.

Q. What did he say?

A. "I think I pulled a muscle in my back." And I asked him if he was all right, you know.

Q. And what did he say?

A. He said, "I think so."

Q. He told you he was okay?

A. That's what he - - yeah.

Q. He went off to work that day?

A. Yes, he did.

Q. Did he work a full shift that day?

A. No, he didn't.

Q. Didn't work a full shift?

A. No.

Q. How come? Couldn't do it because of the back pain?

A. That's what he told me when he got home.

Q. So he came home and said that he'd tried to work with his back, but the work was making it worse and he had to come home, true?

A. True.

Q. And this was the day before April 17th?

A. Yes.

Q. And how do you remember that day so clearly?

A. Well, one thing, with the talking of this and a claim or whatever was going on around my table, I knew everything happened the day before.

Q. And so do you know if he went to a doctor on the 16th?

A. Not for sure. Not for sure.

Q. Okay. And then he went into work the next day?

A. Yeah, I think he did.

Q. And he tried to do the job?

A. I think so, yes.

Q. And he reported to you that he couldn't do the job because the work was making it worse?

A. Yeah.

Q. True?

A. True.

Q. And that's what happened the 16th, the work made it worse, true?

A. True.

Q. And it got to the point that he needed to go to the doctor on the 17th, true?

A. True.

Q. And you could see him in pain, couldn't you?

A. Yeah, I could. Yeah.

Q. And was his condition worse on the 17th than it was on the 16th? He was in a lot more pain on the 17th than he was on the 16th, true?

A. Yeah, true.

Q. And that was after he'd gone to work - - was he in a greater degree of pain after he had tried to go to work, in other words, he went to work on the 17th and then when he came home from work after attempting to work he was in a lot more pain, true?

A. Seemed to be, yes.

Q. And you saw that?

A. Yes.⁸

Terry Powell denied that claimant was injured working for him. He also denied any knowledge of claimant being injured working for another employer, although he could not say for sure whom claimant worked for after he dropped claimant off at the Powell Roofing office. As for the conversation that allegedly took place at Terry Powell's kitchen table, Terry Powell said that occurred sometime after April 17, 2000.

Q. (Mr. Bideau) Terry, looking over your brother's testimony that he gave on October 30 here, specifically on page 33, he seems to indicate that he thought this work that was being done on Sunday was for either you or another brother and wasn't his job. Do you remember whose job it was that you were taking him to on Sunday?

A. (Terry L. Powell) No. Just to the shop.

Q. All right. Now, this conversation that you talked about around your kitchen table, do you remember whether that occurred before or after the job injury on the 17th?

A. It was after.

Q. Okay. Tell me what you remember about that conversation around the kitchen table.

A. I don't remember a whole lot. Said something about - - Lonnie had asked something about if he'd find out workmen's comp or if there was any way workmen's

⁸ *Id.* at 11-15.

comp would pay for his injuries, even though he wasn't on the property. That's all I know.

Q. And what was said or suggested to him, do you remember?

A. Oh, about seeing an attorney and see what could be done?

Q. Okay. Was there anything said that - - for instance, your brother used the language here, quote, "Well, hey, you can file against Tom, he's got insurance," unquote, do you recall anything being said like that?

A. I don't recall that, no. ⁹

Claimant first sought medical treatment at the emergency room of Mount Carmel Medical Center in Pittsburg, Kansas, on April 17, 2000. The Mount Carmel Medical Center emergency room records are not in evidence. However, the medical reports and deposition testimony of the two physicians that testified in this case, Dr. Vito Carabetta and Dr. Edward Prostic, suggest that they were provided with the claimant's medical records including those from Mount Carmel Medical Center. Neither Dr. Carabetta nor Dr. Prostic mentioned there being any history inconsistent with what claimant reported to them. Nor was claimant cross examined about any inconsistent medical histories. Therefore, the inference is that the records contained a history consistent with claimant's testimony of being injured at work on April 17, 2000.

The theory put forth by respondent is that claimant was injured sometime before he started to work for respondent on April 17, 2000, either while working for a different employer or while getting out of Terry Powell's car on either April 16 or April 17, 2000. Tom Powell relates a conversation on the morning of April 17 that was allegedly witnessed by RaeAnn Rose, Jerry Powell and Terry Powell. But none of these witnesses who were allegedly present at this conversation made any mention of it. Furthermore, the testimony of each of them stands in contradiction of Tom Powell's testimony. In addition, Tom Powell's testimony concerning the alleged conspiracy to pursue a fraudulent claim which he says he learned of from Terry Powell is likewise contradicted in large part by Terry Powell. Terry Powell testified that he recalls claimant's workers compensation claim being discussed, but that conversation occurred after April 17, 2000. It follows that a conspiracy hatched after April 17, 2000 to attribute claimant's back injury to his work with respondent is contradicted by claimant reporting a work-related back injury at the Mount Carmel Medical Center emergency room on April 17, 2000. Claimant may have "pulled a muscle" or twisted his back existing Terry Powell's vehicle the morning of April 16 or 17, 2000, but it is undisputed that claimant thereafter performed heavy manual labor for respondent.

⁹ *Id.* at 15 and 16.

Based on this record, the Board finds that it is more probable than not that claimant was injured performing work for respondent on April 17, 2000. Therefore, this matter should be remanded to the ALJ for a determination of the remaining issues, including the nature and extent of claimant's disability.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated July 17, 2003, is reversed and remanded.

IT IS SO ORDERED.

Dated this ____ day of January 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent
Edwin H. Bideau, Attorney for Workers Compensation Fund
Jon L. Frobish, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director